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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1554

GRANDVIEW BANK AND TRUST COMPANY,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

and

COMMERCE BANCSHARES, INC.,
Respondents.

BRIEF FOR RESPONDENT COMMERCE BANCSHARES, INC. IN OPPOSITION

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and

COMMERCE BANCSHARES, INC.,
Respondents.

BRIEF FOR RESPONDENT COMMERCE BANCSHARES, INC. IN OPPOSITION

Respondent Commerce Bancshares, Inc. ("Bancshares") opposes the petition for a writ of certiorari filed in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 550 F. 2d 415 (1977) and is set forth at pp. A1 to A14 of the Appendix to the Petition. The Order of the Board of Governors of the Federal Reserve System ("the Board") is reported at 41 Fed. Reg. 12093 (1976) and is set forth at pp. A14 to A18 of the appendix to the petition.

JURISDICTION

The grounds on which this Court's jurisdiction is invoked are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the court below was correct in affirming the Board's determination that, as a bank holding company seeking to make a new entry through acquisition of a newly chartered bank, approval of Bancshares' application to acquire the New Bank (a) was not barred by the branch-banking laws of Missouri, and (b) was favored by competitive considerations.

2. Whether the Court of Appeals was correct in its determination that the Board acted within its discretion in denying petitioner's request for a hearing, and that the procedures employed by the Board were otherwise free of prejudice to petitioner.

3. Whether the Board's failure to act on Bancshares' application within the period authorized by law, coupled with the statutory provision that, upon such failure, "the application shall be deemed to have been granted," provides an alternative basis for the challenged acquisition which renders moot petitioner's complaints concerning the affirmation by the court below of the Board's approval Order.

STATUTES INVOLVED

The statutes involved in this case, the full text of which are set forth in an appendix to this Brief in Opposition, are cited below:

12 U.S.C. §§ 1842(a), (b) and (c)
12 U.S.C. § 1848
R.S. Mo. § 362.105(1)
R.S. Mo. §§ 362.915, 362.920

STATEMENT OF THE CASE

This litigation arises out of the Board's approval, issued under provisions of the federal Bank Holding Company Act, of an application of Bancshares to acquire substantially all of the voting stock of a new national bank ("the New Bank"). The New Bank had been organized as a proposed subsidiary of Bancshares to provide an alternative source of banking services in the City Grandview, an incorporated community lying in the southeastern portion of the Kansas City Metropolitan Area; prior to the time the New Bank commenced operations, petitioner was the only bank located in Grandview (R. 43, 327).[1]

Bancshares is a bank holding company which was organized in 1966 and now controls 31 banks located in Missouri (R. 297, 435). On January 23, 1975 the Comptroller of the Currency of the United States ("Comptroller") gave his preliminary approval to an application seeking authority to organize the New Bank; this approval was conditioned on, *inter alia*, the requirement that Bancshares would hold all of the bank's stock with the exception of directors' qualifying shares (R. 10, 11). On March 5, 1975, Bancshares filed an application with the Federal Reserve Bank of Kansas City ("Reserve Bank") seeking authority, pursuant to § 3(a)(3) of the Bank Holding Company Act (12 U.S.C. § 1842) to acquire substantially all of the voting stock of the New Bank (R. 1).

After obtaining from Bancshares certain additional information it believed necessary to clarify the application, on April 15, 1975, the Reserve Bank transmitted copies thereof to the Comptroller, the Assistant Attorney General of the United States (Antitrust Division), the

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[1] References to the record below (which consisted of the administrative record compiled before the Board) are cited "R. " herein.

Commissioner of Finance, State of Missouri, and the Federal Deposit Insurance Corporation (R. 244 to R. 247); in addition, the Reserve Bank forwarded the application to the Board, indicating that, in its opinion, the application was "complete and ready for consideration by the Board" (R. 242). On May 15, 1975, the Commissioner of Finance, who is charged by law with responsibility for the execution of Missouri's banking statutes (R.S. Mo. § 361.010, *et seq.*), advised the Board that Bancshares' application was lawful under the Missouri Bank Holding Company Act (R. 290, 291); and on July 8, 1975, the Comptroller recommended approval of the application as in the public interest, noting specifically the absence of adverse competitive effects and predicting that "[c]ompetition in the Grandview area will be stimulated by the presence of an additional banking alternative" (R. 378, 379). No comments pertinent to Bancshares' application were received from the Assistant Attorney General or the Federal Deposit Insurance Corporation.

Notice of Bancshares' application was published in the Federal Register on May 1, 1975, offering the public an opportunity to inspect the application and submit written comments thereon "to be received [by the Board] not later than May 27, 1975" (R. 248). In numerous submissions made before, during and after the period prescribed for public comment, the petitioner[2] urged the Board to deny Bancshares' application on the grounds *inter alia* that (a) the acquisition would have anticompetitive effects not clearly outweighed in the public interest by any effect in meeting the convenience and needs

[2] In addition, the Bank of Belton, in two letters filed four months after expiration of the comment period, urged that the application be denied for the reasons advanced by petitioner (R. 386, 387, 403, 404). Bank of Belton's subsequent untimely Motion to Intervene in the review proceedings was denied by the Court of Appeals on September 2, 1976.

of the community; (b) the financial and managerial resources and future prospects of Bancshares were questionable; (c) the banking needs of the Grandview community were adequately served without the New Bank; and (d) the acquisition would violate Missouri's branch-banking law because the New Bank would be a sham corporation which would operate in unitary fashion with Bancshares' lead bank (R. 250 to 280). In addition, petitioner moved for an indefinite stay of the administrative proceedings and requested a hearing with the opportunity to employ discovery procedures; however, when pressed by the Board to explain why a written presentation would not suffice in lieu of a formal hearing, petitioner's response stated that, through the discovery procedures thought to be associated with a hearing, it hoped to discover evidence to substantiate its charges of unlawful "unitary operations" in violation of the branch-banking laws (R. 365, 374, 375).

As required by the Board's regulations, the Reserve Bank investigated Bancshares' application and, in a lengthy analysis thereof filed with the Board, rejected petitioner's arguments that the New Bank would operate in violation of the branch-banking laws or have anti-competitive effects (R. 311, 312, 326). Instead, the report concludes that the acquisition "could favorably affect competition in the Grandview area," and makes favorable findings regarding the financial condition, managerial resources and future prospects of Bancshares and the New Bank (R. 297-301).

On March 15, 1976—nine months after expiration of the period it set for public comment and eight months after its receipt of the Comptroller's advisory views—the Board issued its unanimous Order approving Bancshares' application, and denying petitioner's requests for a hearing and an indefinite stay (R. 434 to R. 440). Addressing competitive considerations, the Board found that the

acquisition would "not have significant adverse effects on existing or potential competition;" rather, noting that the application related to a proposed new entry, the Board foresaw increased "competition in this area through the introduction of another competitor" (R. 437). Favorable findings were made with respect to the financial and managerial resources and prospects of Bancshares and the New Bank (R. 437). Taking note of the fact that petitioner was the only bank then operating in Grandview, the Board determined that the proposed acquisition "would benefit the convenience and needs of the area by introducing an alternative source of a full range of banking services" (R. 437). Finally, turning to petitioner's claim that the acquisition would violate the branch-banking laws of Missouri, the Board found (R. 438, 439):

> The facts of record indicate that Bank will be a separate corporation, with its own reserve requirements and capital stock and a loan limit based on such capital stock; that Bank will be managed by its own officers; that Bank's board of directors will be generally separate and independent from the board of Applicant and of Applicant's subsidiaries; and that Bank will issue its own distinctive checks, and use its own stationery. Applicant further states that Bank will be managed by its own local officers and that money deposited at Bank will not be credited to the account of a depositor at any other banking subsidiary of Applicant and, conversely, any money deposited at any other banking subsidiary of Applicant will not be credited to the account of a depositor at Bank. (Footnote omitted.)

Based upon these facts, the Board concluded that "upon consummation of the proposed acquisition, a unitary operation will not exist between Bank and any of Applicant's other banking subsidiaries" (R. 439). Bancshares' application was, accordingly, approved as in the "public interest" (R. 440).

On or about March 23, 1976, petitioner initiated proceedings in the Eighth Circuit to review the Board's Order. By Order dated April 15, 1976, the Court of Appeals denied petitioner's motion for stay pending review. On July 14, 1976 Bancshares effected the acquisition, and the New Bank, having received from the Comptroller final authority to commence business, opened its doors to the public. On March 2, 1977, the Court of Appeals issued its unanimous opinion affirming the Board's Order in all respects and entered judgment accordingly. *Grandview Bank & Trust* v. *Board of Governors*, 550 F. 2d 415 (8th Cir. 1977).

ARGUMENT

Petitioner argues here, as it did without success before the Court of Appeals and the Board, that the Missouri statute which prohibits a bank from establishing branches also precludes Bancshares from expansion through the acquisition of the New Bank. Although it acknowledges the existence of legislation at both the federal and state levels which permits bank holding companies in Missouri to acquire control of banks and thereafter operate them as subsidiaries, petitioner nonetheless contends, relying on the District of Columbia Circuit's opinion in *Whitney National Bank* v. *The Bank of New Orleans*, 323 F. 2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), that the separate incorporation of the New Bank should be disregarded and Bancshares (or its lead bank) found to be engaged in unlawful branch-banking through the New Bank.

In addition, petitioner argues that the court below erred in supporting the Board's determination that the "relevant banking market," in which the competitive effects of Bancshares' new entry should be measured, is a six-county area rather than Jackson County alone as contended by petitioner. Finally, petitioner urges that the Court of Appeals erred in rejecting its contention that the Board's procedures were constitutionally defective.

Bancshares respectfully submits that there is absolutely no merit to any of these arguments, many of which are based on misstatements of the record, or an unsupported assertions made by petitioner to the Board;[3] that the Board's Order and the decision of the unanimous panel of the Court of Appeals sustaining it are manifestly correct and in accord with settled principles of law; and that none of the considerations governing review by this Court on writ of certiorari are present. Moreover, the failure of the Board to act upon Bancshares' application within the period authorized by law, coupled with the statutory provision that upon such failure "the application shall be deemed to have been granted", provides alternative grounds to sustain Bancshares' acquisition of the New Bank, and renders moot petitioner's challenge to the Board's Order, making this case a most inappropriate vehicle for consideration of the federal questions petitioner alleges to be involved in that challenge. The petition should, accordingly, be denied for this additional reason.

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[3] Apparently unwilling or unable to be instructed by the record or the court below, petitioner repeats many of the frivolous arguments which were rejected at earlier stages of the administrative and judicial process. Thus, while the petition asserts that "Bancshares holds itself out as a bank" because of the composition of its financial statements (Pet. 21), a review of petitioner's supporting record references (R. 15, 16) reveals that they are to Bancshares' "Consolidated" financial statements, which are required by generally accepted accounting principles to record certain of the assets and liabilities of its subsidiary banks; Bancshares' financial statements, prepared on the "Parent Company Only" basis do not (R. 13, 17). Later, in connection with its argument that the Board's procedures were defective, and in an apparent attempt to attach some relevance to the service of a Bancshares' official as a director of the Reserve Bank, petitioner asserts that the deletions it complains of in the record were made by the Reserve Bank (Pet. 27); in fact, the Certification to the record filed with the court below indicates that the Board's staff in Washington, D.C., determined which materials should, consistent with the Board's regulations and other provisions of federal law, be deleted.

I. THE PETITION PRESENTS NO QUESTIONS WARRANTING REVIEW BY THIS COURT

In establishing a procedure for judicial review of the Board's orders under the Bank Holding Company Act, Congress provided that "[t]he findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." 12 U.S.C. § 1848. The court below correctly determined that substantial evidence in the more than 400-page administrative record supports the Board's findings; that the Board's conclusions were rational; and that the Board's procedures were fair to petitioner. The petition presents no basis to justify a further review of these patently sound determinations.

A. The Branch-Banking Issue

The federal Bank Holding Company Act permits a bank holding company such as Bancshares, upon obtaining the prior approval of the Board,[4] to acquire control of additional banks. 12 U.S.C. § 1842(a) and (b). One provision of this statute reserves to each State "such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof." 12 U.S.C. § 1846. Acting pursuant to the authority thus reserved to them, some States have prohibited a company from acquiring control of any, or of more than one bank.[5] However,

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[4] The statute prescribes one additional means by which a bank holding company can obtain such authority: it provides that, upon the failure of the Board to act upon such an application within the 91-day period prescribed by statute, "the application shall be deemed to have been granted." 12 U.S.C. § 1842(b). In Section II of this Brief, Bancshares will explain why it believes that this provision renders moot the issues petitioner seeks to have this Court review.

[5] The Louisiana statute discussed by this Court in its decision in *Whitney National Bank, supra.*, 379 U.S. at 414, contains such a prohibition. La. Rev. Stat. § 6.1003.

the State of Missouri has enacted legislation which specifically permits bank holding companies to obtain control of additional banks, subject to certain regulatory provisions, including the requirement that the acquisition be declared lawful by the Commissioner of Finance. R.S. Mo. §§ 362.915, 362.920. On the other hand, the State of Missouri prohibits banks from establishing branches[6] (R.S. Mo. § 362.105(i)); and this provision is incorporated by federal law (12 U.S.C. § 36(c)), with the result that national banks in Missouri are subject to the same prohibition. *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 133 (1969). One result of these divergent statutory provisions is that a bank holding company in Missouri—as well as in other states with similar banking statutes—may (with Board approval) acquire control of separately organized banks located at various points throughout the State, although a single bank would be unable to establish branches at such locations.

The Court below comprehended this statutory scheme, and, although the record before it disclosed extensive administrative scrutiny of the branch-banking question,[7] it nonetheless conducted its own analysis of the eviden-

[6] However, the laws of Missouri do permit a bank to establish "one facility for drive-in and walk-up service" within 1,000 feet of its main banking house. R.S. Mo. § 362.107.

[7] In its application to the Board, Bancshares made a full factual presentation concerning the manner in which the New Bank would operate as a separately organized subsidiary (R. 95-98). The Reserve Bank's investigation of Bancshares' application included a lengthy analysis of the branch-banking question raised by petitioner, upon the basis of which the Reserve Bank reported to the Board that no violation of such laws would result from Bancshares' acquisition of the New Bank (R. 311, 312). When Bancshares' application reached the Board in Washington, yet another investigation was initiated into the issue raised by petitioner, with the facts thus elicited providing additional support for the Board's determination that no violation of the branch-banking laws would occur as a result of the acquisition (R. 329, 330, 344-347).

tiary support for the findings upon which the Board's favorable conclusion is based. *Grandview Bank & Trust*, *supra.*, 550 F. 2d at 518, 519. Thus, the court determined that the New Bank would have its own separate capital structure as the result of the purchase by Bancshares of its shares; and, disagreeing with petitioner, the court found this to be the "traditional means by which a [bank holding company] acquires control of a bank." Noting that the record indicated that the Board of Directors of the New Bank would be "substantially separate and independent" of Banschares' other subsidiary banks, the court ruled that such commonality of management as might exist was a "usual, although not necessary, result of common ownership and control." The New Bank was determined to have its own loan limits, with the possibility of increased loan capacity through participation arrangements with affiliated banks; such transactions were found to be "the traditional and legal means by which a [bank holding company] may work with its affiliates." The court took note of the evidence indicating that the New Bank would have its own public identity and would not be used as the conduit through which an affiliated bank would conduct operations in Grandview; and the automated general ledger service provided by Bancshares to all its affiliated banks was found to be permissable under the Bank Holding Company Act and regulations published thereunder. Based upon this review of the record, the Court of Appeals affirmed the Board's determination that the transaction represented the attempt of an "existing multi-bank [holding company] seeking to acquire a newly established bank" which would not therefore, result in a violation of the branch-banking laws. This conclusion makes obvious good sense, and recognizes the legislative determination to permit expansion by financial institutions in one form, while curtailing it in others.

Petitioner's reliance on the District of Columbia Circuit's decision in *Whitney National Bank, supra,*—which was reversed by this Court in order to give the Board the opportunity to rule on the effect of Louisiana's then newly-enacted bank holding company statute on Whitney National Bank's proposals,[8] 379 U.S. 411 (1965)—is misplaced. In that case, the District of Columbia Circuit discerned an "elaborate and ingenious scheme" involving sham corporations designed for the sole purpose of evading branch-banking restrictions, thus requiring it to "pierce the corporate veil" and enjoin one bank from doing business through another in violation of the law. The facts in the instant case, as determined both by the Board and the court below, demonstrate that Bancshares is a "traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks" in the manner approved by the District of Columbia Circuit in *Whitney*. 323 F. 2d at 303. In light of the Missouri legislation which specifically authorizes the operation of multi-bank holding companies, the court below was plainly correct in limiting to cases of "fraud or complete subterfuge" the principle sought to be invoked by petitioner in this case.[9] *Grandview Bank &*

[8] The importance of an initial determination of such issues by the Board was emphasized because (379 U.S. at 420):

> Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters to explore and pass on the ramifications of a proposed bank holding company arrangement.

[9] Petitioner errs in suggesting that the decision of the court below conflicts with that of the Ninth Circuit in *First National Bank in Billings* v. *First Bank Stock Corporation*, 306 F.2d 937 (1962), or with the court's own decision in *Commercial National Bank in Little Rock* v. *Board of Governors*, 451 F.2d 86 (1971). In *Billings*, the Ninth Circuit stated that, in order to establish that a bank holding company's acquisition of an additional banking

Trust, supra., 550 F. 2d at 420. Any further review of this matter in this Court is unwarranted.

B. Competitive Considerations

Petitioner complains that the Court of Appeals sustained the Board's determination that the relevant banking market consisted of a six-county area comprising the Kansas City banking market, rather than Jackson County alone as contended by petitioner.[10] However, the

subsidiary will violate prohibitions against branch-banking, opponents of the arrangement must demonstrate that (306 F.2d at 942):

> [I]n substance, [an existing banking subsidiary of the holding company] is doing business through the instrumentality of [the new banking subsidiary], or vice versa, in the same way as if the two institutions were one (Citation omitted). We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to "pierce the corporate veil" when the realities require it.
>
> On the other hand, it is not enough for appellants to show that common control, through stock ownership by [the holding company] which participates actively in the management of its subsidiaries, produces cooperation or even eliminates competition between the subsidiaries. This is a usual, although not necessary, result of common ownership and control.

Precisely the same test was applied by the Eighth Circuit in *Commercial National Bank, supra*, 451 F.2d at 90, as well as in the instant case.

[10] Petitioner's additional argument (Pet. 12-15) that Bancshares' acquisition of the New Bank somehow resulted in an unlawful concentration of deposits or in monopoly is outside the questions set forth in the petition, and therefore inappropriate for consideration by this Court pursuant to Rule 23(1)(c). *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). In addition, the argument is frivolous: with the record demonstrating that Bancshares' share of deposits in the relevant banking market amounted to only 13.86% in 1974 (rather than the 30% figure erroneously claimed by petitioner), and the next two largest organizations holding 12.44% and 10.79%, respectively, the Court of Appeals was plainly correct in sustaining the Board's determination that a new entry by Bancshares into Grandview "would not increase the concentration

record showed that Grandview is a "bedroom community" many of whose residents commute, on major arteries which traverse the city, to employment in other parts of the Kansas City area, with the result that banks throughout that area compete for their patronage [11] (R. 307, 308). The Reserve Bank accordingly reported to the Board that (R. 326):

> [T]he entire area encompassed by its six-county market definition constitutes the relevant banking market, and that Jackson County is in no way isolated or separate from the rest of the urbanized Kansas City SMSA.

With this record before it, the Court of Appeals was clearly correct in concluding that (550 F. 2d at 420):

> In determining the relevant market area we must give great weight to the expertise of the Board which is familiar with the competitive structure of the area involved. The evidence clearly supports the Board's findings here.

Indeed, whatever the relevant market selected for measuring the competitive effect of the proposal, it would be a novel antitrust posture to conclude that a new expansion within that market, to a location removed from offices maintained by other subsidiaries of the holding company, would create significant anticompetitive con-

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of banking resources in Missouri", but rather would have procompetitive effects in providing an additional local banking alternative. R. 319, 320, 437; *Grandview Bank & Trust, supra*, 550 F.2d at 420.

[11] Indeed, in its representations to the Board during the administrative process, petitioner argued that the City of Grandview was not an "isolated corporate community" since it was "completely surrounded by the corporate limits of Kansas City, Missouri, and may be traversed in any direction in a matter of minutes" (R. 287, 288).

sequences.[12] No justification for further review of this question has been advanced by petitioner.

C. The Procedures Employed by the Board Were Fair to Petitioner

Petitioner contends that it was denied due process through the Board's refusal of its request for a hearing; the unavailablity of discovery procedures; the confidential treatment accorded to certain portions of the agency record; and because of an alleged conflict of interest. However, where a bank holding company such as Bancshares seeks authority to expand *de novo* through acquisition of shares of a newly chartered bank, the pertinent federal statute requires a hearing *only* if within thirty days after being notified of the filing of the application, the Comptroller (in the case of a national bank) recommends disapproval. 12 U.S.C. § 1842(b). In this case, the Comptroller recommended approval (R. 378, 379). In such circumstances, the Board was clearly not required by statute to hold a hearing;[13] and, with

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[12] Petitioner errs in claiming that the Board's determination of the relevant market conflicts with this Court's pronouncements in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), and *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970). In both the *Philadelphia* and *Phillipsburg* cases, this Court dealt with mergers between actual competitors, which eliminated one from the market; by contrast, the instant transaction, although structured as an acquisition, is in reality a new entry by Bancshares which will increase the number of operating banks. Thus, the competitive circumstances in the cases cited by petitioner bear no resemblance to this one. Nonetheless, in light of the evidence establishing that Grandview is a bedroom community with a heavy population of commuters, the relevant market area delineated by the Board fully accords with this Court's statement that it "must be charted by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies . . . ." *Philadelphia, supra*, 374 U.S. at 359; *Phillipsburg, supra*, 399 U.S. at 362.

[13] Every circuit court to consider the question has ruled that, except where provided for by the statute, the Board is not required by the Constitution to hold hearings in connection with proceedings

no real dispute regarding the underlying facts, and petitioner afforded ample opportunity to submit written views and documentary evidence, there was plainly no impropriety in denying to petitioner the hearing which the Board nonetheless reserves the right to provide at its discretion.[14]

Petitioner's complaint at the denial of discovery procedures also misses the mark: such procedures were deliberately withheld by Congress from utilization in proceedings before the Board under the Bank Holding Company Act, with the result that the Board was powerless to authorize their use.[15] Petitioner's remaining charges

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under § 3 of the Bank Holding Company Act. *Kirsch* v. *Board of Governors*, 353 F.2d 353, 356 (6th Cir. 1965); *First Wisconsin Bankshares Corporation* v. *Board of Governors*, 325 F.2d 946, 960 (7th Cir. 1963); *Northwest Bancorporation* v. *Board of Governors*, 303 F.2d 832, 842 (8th Cir. 1962); *Commercial National Bank of Little Rock* v. *Board of Governors*, 451 F.2d 86, 90, 91 (8th Cir. 1971); *Bank of Boulder* v. *Board of Governors*, 535 F.2d 1221, 1224 (10th Cir. 1976).

[14] Although not required by law, a hearing may nonetheless be held by the Board on a bank holding company application if it determines such a course of action to be "desirable." 12 C.F.R. § 262.3(g)(2). When pressed by the Board to give "reasons why a written presentation would not suffice in lieu of a formal hearing," petitioner's response pointed to no factual dispute capable of resolution at a hearing, but, instead, voiced the hope—based on its erroneous belief that discovery procedures would be available to it—that it could thereby obtain evidence to substantiate the charges of illegality it had already made (R. 365, 374, 375).

[15] In the Congressional debate which preceded enactment of the Bank Holding Company Act of 1956, an amendment was introduced by Senator Morse which would have given the Board or its designee the authority "to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce relevant books, records and other papers." 102 Cong. Record 6959 (1956). Over the vigorous objection of Senator Morse, who characterized as a "major defect in the bill" the absence of a provision for subpoena power in the Board, the amendment which would have remedied that omission was defeated (*Id.*) In subsequent proceedings under the Bank Holding Company Act, the Board itself has recognized its inability to

of procedural unfairness are easily disposed of. The "deletions in the record" complained of—which in the aggregate comprise only a tiny portion of the agency record—consisted of (1) a list, submitted by Bancshares in confidence to the Board, of loans made by its subsidiary banks, where the collateral consisted of more than 5% of the stock of a bank; and (2) certain portions of memoranda prepared by the Board's staff which expressed ultimate recommendations, legal and economic advice and opinions, and information taken from reports of Bancshares' subsidiary banks. The Board's action in withholding such material from the public record accords with its own regulations [16] as well as the Freedom of Information Act,[17] and petitioner has, in any event, been unable to demonstrate disadvantage therefrom; accordingly, the Court of Appeals properly declined to order the Board to provide petitioner with access thereto. Petitioner's claim of conflict-of-interest is spurious: Bancshares' Chairman of the Board did not commence service as a Class A director of the Federal Reserve Bank of Kansas City [18] until long after the Reserve Bank

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authorize discovery procedures. See, e.g., *Northwest Bancorporation*, 59 Fed. Res. Bull. 701, 704 (September, 1973); *Mellon National Corporation*, 62 Fed. Res. Bull. 702, 712 (August, 1976).

[16] See 12 C.F.R. § 261.6(a)(2) and (3), § 261.6(c) (1976 Ed.).

[17] The material concerning the financial affairs of certain of its customers furnished by Bancshares in confidence to the Board was clearly exempt from disclosure by 5 U.S.C. § 552(b)(4). The nonfactual portions of memoranda of the Board's staff, and the information extracted from examination reports, were protected from disclosure by 5 U.S.C. § 552(b)(8), as well as the privilege afforded the deliberative processes of the agency and its staff. Since detailed administrative findings were made at the same time as the decision, and there has been absolutely no showing of bad faith on the part of the Board, there is no predicate for making inquiry into the mental processes of the decision-makers. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1970); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

[18] The Federal Reserve Act requires that Class A directors be representatives of the member banks of that reserve district. 12 U.S.C. § 302.

concluded its investigation and submitted a report thereon to the Board;[19] and, in any event, the Reserve Bank acted only as investigator, not decision-maker,[20] with respect to Bancshares' application. The Court of Appeals was plainly correct in rejecting petitioner's contrived allegations of procedural unfairness.[21]

II. BANCSHARES' ACQUISITION OF THE NEW BANK MAY BE SUPPORTED ON GROUNDS WHOLLY INDEPENDENT OF THE BOARD'S ORDER. THE PETITION SHOULD, THEREFORE, BE DISMISSED AS MOOT

Under the terms of the Bank Holding Company Act, Bancshares' authority to acquire and hold the shares of the New Bank may be grounded upon either (1) the Board's prior approval pursuant to 12 U.S.C. § 1842(a) of an application of Bancshares to effect such acquisition, or (2) the Board's failure to act in timely fashion upon such an application, resulting in its approval by operation of law as provided for by 12 U.S.C. § 1842(b). The court below focussed on the first basis for the necessary

[19] The Reserve Bank's report on Bancshares' application was submitted to the Board on May 20, 1975 (R. 292); the appointment as Reserve Bank director did not become effective until January 1, 1976. 62 Fed. Res. Bull. 169, 179 (February, 1976).

[20] The Reserve Bank's role was limited to an investigatory one because Bancshares' application was protested (R. 242). In any event, the Board's published regulations preclude a Reserve Bank from acting (under delegated authority) in a decision-making capacity in the event that an official of the bank holding company is also a director of the Reserve Bank. 12 C.F.R. § 265.2(a)(3)(i)(a) (1976 Ed.).

[21] Petitioner's claim that the Comptroller's approval of the New Bank's charter application had been withdrawn (Pet. 25) is outside the questions set forth in the petition, and is therefore inappropriate for review by this Court. *Andrews* v. *Louisville & Nashville R. Co.*, *supra*, 406 U.S. at 325. In any event, this claim was properly found to be "without merit" by the court below. *Grandview Bank & Trust*, *supra*, 550 F.2d at 421.

authority in Bancshares, and affirmed the Board's approval Order. While Bancshares believes that the Court of Appeals properly determined the Board's Order to be lawful and well supported by the record, Bancshares additionally contends—as it did in the court below—that the alternative support for its acquisition of the New Bank, found in approval of its application by operation of law, is not dependent upon the validity of the Board's Order, with the result that the issues raised by the petition are rendered moot. *De Funis* v. *Odegaard*, 416 U.S. 312 (1974).

Thus, referring to applications by bank holding companies for authority to acquire control of banks, the statute provides (12 U.S.C. § 1842(b)):

> In the event of the failure of the Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

The cases dealing with this provision have construed the statute to mean that:

> [T]he 91-day period of § 1842(b) begins to run when the final material needed for the Fed's decision is received from the various interested sources outside of the Fed, which would ordinarily be the applicant and government agencies other than the Fed.

Tri-State Bancorporation v. *Board of Governors*, 524 F. 2d 562, 566 (7th Cir. 1975).[22]

The record in this case reveals that the timetable followed by the Board did not comport with the mandate

[22] Accord, *North Lawndale Economic Development Corporation* v. *Board of Governors*, Civil No. 76-1607 (7th Cir., filed March 31, 1977); *First Lincolnwood Corporation* v. *Board of Governors*, 546 F.2d 718 (7th Cir. 1976); *Memphis Trust Company* v. *Board of Governors*, Civil No. C-76-64, (W.D. Tenn., filed June 4, 1976).

of the statute. The application was filed by Bancshares with the Reserve Bank on March 5, 1975 (R. 1), and was pronounced by the Reserve Bank to be "complete and ready for consideration by the Board" on April 15, 1975 (R. 242). The period set by the Board for receipt of comments on the application from the public ended on May 27, 1975 (R. 248). The Comptroller was notified of the filing of the application in mid-April, 1975 (R. 244), and the statutory period which § 1842(b) allows for submission of the Comptroller's views expired thirty days thereafter. It thus appears that on May 27, 1975 the Board had before it an application which was complete and ready for consideration, and both the statutory period allowed for the submission of views of the bank's supervisor and the administrative period established by the Board for the submission of comments from the public had expired. That date, we believe, marks the "submission to the Board of the complete record" on the application.[22] 12 U.S.C. § 1842(b). Accordingly, upon the failure of the Board to act upon the application within the 91-day period ending on August 26, 1975, the application was approved by operation of the law. That being the case, even were this Court to find in the petition some special or important reason to review the Court of Appeals' affirmation of the Board's Order, that review—regardless of its conclusion—could not accord to petitioner the relief sought, because Bancshares' acquisition of the New Bank must nevertheless be sustained on the basis of this independent statutory authorization.

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[22] Numerous submissions were received by the Board from Petitioner after the period established for public comment expired on May 27, 1975 (R. 248; 380-385; 390-398; 407; 409-414; 419; 420; 424-427). However, the Board was powerless to toll the commencement of the time period prescribed by Congress through acquiescence in petitioner's efforts to perpetuate the administrative proceedings; otherwise the 91-day period would have no meaning.

CONCLUSION

For the foregoing reasons, Bancshares submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

12 U.S.C. § 1842(a), (b), (c) provide that:

12 U.S.C. 1842.—(a) It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 2(b) and except as provided in paragraph (2) and (3) of section 2(g), or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after the date of enactment of this Act in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition. For the purpose of the preceding sentence, bank shares acquired after the date of enactment of the Bank Holding Company Act Amendments of 1970 shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company has sole discretionary authority

to exercise voting rights with respect thereto; but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired in a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing. In the event of the failure of the

Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted.

(c) The Board shall not approve—

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

12 U.S.C § 1848 provides that:

12 U.S.C. 1848.—Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after

the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

R.S. Mo. § 362.105(1) provides, as here pertinent, that:

362.105. *Powers and authority of banks and trust companies.*—1. Every bank and trust company created under the laws of this state may:

(1) Conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral of personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, the corporation may receive and retain the interest in advance; provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;

R.S. Mo. § 362.915 provides that:

Limitation on bank holding company—total deposits, how computed.—It is unlawful for any bank holding

company to obtain control of any bank if the total deposits in the bank together with the total deposits in all banks in Missouri controlled by the bank holding company exceed thirteen percent of the total bank deposits in all banks in the state, determined as of the date of the last simultaneous request for reports of condition issued by the Federal Deposit Insurance Corporation, the Comptroller of the Currency and the director of finance of the state of Missouri, for which totals are available, preceding the date the bank holding company files an application with the division of finance as required by sections 362.910 to 362.940, except that the reports at mid-year and year end shall not be used for such purpose. In computing the total bank deposits in all banks controlled by the bank holding company and the bank which the holding company seeks to acquire, there shall be deducted from total deposits, certificates of deposit in the face amount of one hundred thousand dollars or more, deposits from sources outside the United States, and deposits of banks other than banks controlled by the bank holding company.

R.S. Mo. § 362.920 provides that:

Procedure to obtain order allowing acquisition—duty of director.—1. A bank holding company which seeks to acquire control of a bank or a bank holding company shall file with the division of finance a copy of any application which the bank holding company is required to file with the Board of Governors of the Federal Reserve System, together with such supplemental data as will enable the director of finance to determine if the acquisition is lawful under the provisions of section 362.915. The director of finance shall, within thirty days after receiving the application, issue his order declaring the acquisition to be lawful or unlawful under the provisions of section 362.915. The order of the director shall be the final administrative decision which

may be appealed in the circuit court or court of common pleas of the county of proper venue within thirty days after the mailing or delivery of notice of the director's order, by any party aggrieved by the order.

2. The director shall also determine if the proposed acquisition of a bank by a bank holding company is consistent with the interests of promoting and maintaining a sound banking system and sound trust companies, the security of deposits and depositors and other customers, the preservation of the liquid position of banks and in the interest of preventing injurious credit expansions and contractions. If the director determines that the proposed acquisition is not consistent with those objectives, he shall, within thirty days of receipt of the application, communicate his objections to the proposed acquisition to the Board of Governors of the Federal Reserve System.

3. The provisions of section 362.915 and subsections 1 and 2 of this section shall not apply in the case of the acquisition of a bank or bank holding company acquired at the request of the director of finance, the Federal Deposit Insurance Corporation or the Board of Governors of the Federal Reserve System in order to prevent the imminent failure of a bank.